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(2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PARENT-GUARDIAN ASSOCIATION OF ARLINGTON DEVELOPMENTAL CENTER,
Petitioner,

v.

PEOPLE FIRST OF TENNESSEE,
on behalf of its members, et al,;

ARLINGTON DEVELOPMENTAL CENTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In this class action on behalf of residents of the Arlington Developmental Center ("Arlington"), a state institution for persons with developmental disabilities who claimed their right to minimally adequate habilitation and to freedom of association had been violated, did the District Court abuse its discretion in finding that the named plaintiffs, individual residents of the institution, and People First of Tennessee, an advocacy and self-help organization with members who lived at Arlington, were adequate representatives of a class of Arlington residents?[1]

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[1]The Petitioner's description, in a preamble to the Questions Presented, of the issues in this case is misleading. "This action involves the undisputed habilitation rights of certain severely disabled citizens of Tennessee. Remedies conflict. Over objection, class action status was granted to proponents of one remedy." In fact, not only did the State of Tennessee defendants contend that Arlington residents' right to habilitation had not been violated, the defendant-intervenor Parent-Guardian Association, the Petitioner here, did so as well. The suggestion that different parties proposed different remedies is incorrect; the Respondents were the only parties who sought *any* remedy.

The Petitioner's allegation that services that certain institutional residents need are available only in state institutions is irrelevant to the issues presented by this Petition for Writ of Certiorari and unsupported by the record. Further, the record does not show that services such as "constant monitoring" or "ready availability of medical attention" actually are

2. Did the District Court abuse its discretion in approving a settlement between the plaintiffs and state defendants of institutional residents' First Amendment claims?

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available to class members at Arlington. To the contrary, the District Court's findings show that Arlington's actual provision of services fell well below the constitutional threshold of adequacy.

COUNTER-STATEMENT OF THE CASE

This case was filed as a class action on December 12, 1991, by People First of Tennessee, a statewide advocacy organization governed by people with disabilities, on behalf of its members, and by five residents of Arlington Developmental Center ("Arlington"). The plaintiffs filed the action on behalf of themselves and a proposed class of present, past and future Arlington residents, to redress unlawful conditions at Arlington.[2]

People First of Tennessee became interested in problems at Arlington in March 1991, when the United States Department of Justice issued a Letter of Finding to Governor Ned McWherter informing the Governor that the Department of Justice had found a pattern of serious violations of Arlington residents' constitutional rights. Eventually, the organization concluded that litigation was necessary and filed this action.

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[2]Members of People First of Tennessee, including individual plaintiffs Sandra Howard and Clarence Wilson, were members of the proposed class.

In their complaint filed on December 12, 1991, the plaintiffs asserted that the defendants, officials of the State of Tennessee, had denied them minimally adequate living arrangements, habilitation and services at Arlington, in violation of their rights under the First and Fourteenth Amendments and certain federal statutes. The case was filed in the United States District Court for the Middle District of Tennessee and subsequently transferred to the Western District of Tennessee on the defendants' motion for transfer of venue. The defendants filed a motion to dismiss the complaint which was denied as to appellees' Due Process and First Amendment claims.[3] Two additional residents of Arlington were added as named plaintiffs in subsequent motions for leave to amend the complaint.

On February 11, 1992, the plaintiffs moved for class certification and proposed the following class definition:

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[3]The court dismissed appellees' claims under Title XIX of the Social Security Act, Sections 100 and 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, certain First Amendment claims set out in Count IV(b), (d), and (e) of the Amended Complaint, and claims under the Equal Protection Clause.

> All persons who on or after December 12, 1989, have resided, or are residing or will reside at the Arlington Developmental Center; all persons who have been transferred to Arlington from other settings such as intermediate care facilities or skilled nursing facilities but remain defendants' responsibility; and all persons at risk of being placed at Arlington Developmental Center.[4]

After the plaintiffs filed their motion for class certification, the Parent-Guardian Association of the Arlington Developmental Center (PGA) filed a motion for leave to intervene and objection to class certification, which leave was granted. The PGA stated that its interest in intervening was to oppose class certification, to prevent closure and to prevent the

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[4]Included within the proposed class are three categories of individuals, including those who *have resided* at Arlington at any time from December 12, 1989 to present, *are residing* at Arlington currently, and all persons at risk of being placed at Arlington in the future. Similar cases are routinely certified by District Courts in institutional litigation. See, e.g., Halderman v. Pennhurst State School & Hospital, 612 F.2d 85, 89 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981), reaff'd on remand, 673 F.2d 647 (3d Cir. 1982), rev'd & remanded, 104 S.Ct. 900 (1984), consent decree entered, 610 F.Supp. 1221 (E.D. Pa. 1985); Richard C. v. Snider, 1993 WL 757634 (W.D.Pa.).

placement of Arlington residents in small community homes.

After leave to intervene was granted, the Intervenor filed an Answer in Intervention, denying the plaintiffs' allegations that the state defendants provided constitutionally deficient care at Arlington. The Intervenor raised no claims against the State of Tennessee, nor did it make any class action allegations of its own, but merely contended that plaintiffs had no remedies at law. Intervenor did not seek to represent the class defined by plaintiffs, or any class. A brief evidentiary hearing was held on the motion for class certification on April 28, 1993, after which the Court allowed the parties to supplement the record until July 1, 1993.

Meanwhile, on January 21, 1992, the United States of America filed suit in the United States District Court for the Western District of Tennessee against the State of Tennessee and the Arlington Developmental Center pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et seq., United States of America v. State of Tennessee, No. 92-2062 (W.D. Tenn.) By an order dated December 11,

1992, the District Court allowed the plaintiffs and PGA intervenor to attend depositions and review documents in the United States case.

Trial began in the United States' case on August 30, 1993 (while the motion for class certification in the present case was pending), and the Court issued a comprehensive opinion in open court on November 22, 1993, followed by written Supplemental Findings of Fact on February 17, 1994. The Court found pervasive violations of Arlington residents' rights under the Fourteenth Amendment in almost every aspect of care and services. In its ruling on November 22, 1993, the District Court issued a preliminary injunction to deal with the immediate threat to human life at Arlington. As to permanent injunctive relief, the District Court directed the Commissioner of the Tennessee Department of Mental Health/Mental Retardation to submit a plan to remedy the violations of constitutional rights and educational opportunities.

On February 7, 1994, the plaintiffs filed a motion for partial summary judgment asking the Court to enter its findings

on liability in United States of America v. State of Tennessee as findings in this case and for consolidation of the two cases. A hearing was held on this motion on April 29, 1994. The intervenor filed a motion to consolidate this case with No. 92-2062 on February 23, 1994.

In August, 1994, after extensive discussions and negotiation, the United States and the State of Tennessee reached agreement on the terms of a Remedial Order to correct the violations of Arlington residents' constitutional rights. The agreement was approved and entered as a consent decree by the District Court on September 2, 1994. The order provided for extensive improvements in care and services at Arlington and obligated the State of Tennessee to reduce the population of Arlington to no more than 200 persons.

The District Court did not immediately decide plaintiffs' outstanding motions for class certification, partial summary judgment, or other motions. Rather, on September 29, 1994, the Court entered an Order Staying Proceedings and denying all outstanding motions without prejudice. The Court instructed

the parties to review the Remedial Order and advise the Court how they wished to proceed in this case. At a status conference on March 31, 1995, the plaintiffs informed the District Court that they wished to refile the motions and proceed to trial.

The plaintiffs renewed their motions for class certification, partial summary judgment and consolidation on June 12, 1995. On June 9, 1995, the intervenor filed a motion to change its status to that of a non-aligned party. The District Court held a hearing on plaintiff's renewed motion for class certification on July 24 and 25th, 1995. The plaintiffs and intervenor presented evidence at the hearing, including the testimony of witnesses and documentary evidence. On September 26, 1995, the District Court issued an opinion and order granting plaintiffs' motion for class certification. On the following day, the District Court granted plaintiffs' motion for partial summary judgment and, treating plaintiffs' and intervenor's motions for consolidation as motions to intervene in No. 92-2062, granted leave to intervene to both sets of parties.

The plaintiffs' remaining claims arising under the First Amendment were resolved in a settlement agreement between the plaintiffs and defendants. The intervenor objected to the settlement. Plaintiffs provided notice of the settlement to members of the class and to all class members' parents, guardians, and next friends pursuant to Rule 23(e). A hearing on the fairness of the settlement was held on September 27, 1996 at which the intervenor submitted evidence in support of its objections to the settlement agreement. The District Court approved the settlement agreement in an order dated January 7, 1997.

Unfortunately, the Petitioner's statement of the case includes numerous misrepresentations that Respondents are required by Supreme Court Rule 15.2 to correct.

The Petitioner errs in terming the investigation by the United States as "The first step to closure." Throughout its initial investigation and the subsequent litigation in United States of America v. State of Tennessee, the United States

consistently and vigorously has sought improvement in services at Arlington. It has never sought closure of the institution.

The Petitioner fails to state that the final ordered entered in United States v. Tennessee, the Remedial Order, is a consent decree agreed to by the State of Tennessee defendants (Pet. at 7). The State's consent was not "limited," as the Petitioner misrepresents (Pet. at 7). Petitioner's statement that "The DOJ Action is now on appeal" (Pet. at 5) is misleading, since the only issue currently on appeal is a subsequent enforcement order issued by the District Court in August, 1997, and not the underlying relief entered in that case. The Remedial Order itself was never appealed.

Contrary to Petitioner's assertion, "denials of due process rights to care and services under the Fourteenth Amendment" to Arlington residents are not at issue in this petition. Those issues were resolved entirely by the unappealed Remedial Order in United States v. Tennessee.

In the proceeding on class certification, the Parent-Guardian Association never sought class representative status,

never offered its own class definition, and never proposed the creation of subclasses. The record is devoid of any evidence that the Parent-Guardian Association "supports strengthening services at Arlington Developmental Center," advocates improvements in community services, or even that it has "years of firsthand experience monitoring the care of disabled family members."[5] Throughout this litigation, the Parent-Guardian Association has taken the position that improvements at Arlington were unnecessary. The Parent-Guardian Association has never sought to be a plaintiff party, and it has never raised claims against the state defendants.

[5]The Parent-Guardian Association as a corporation, not individual family members, is the defendant-intervenor below and the Petitioner here.

SUMMARY OF ARGUMENT

This Petition for Writ of Certiorari raises two issues: whether the District Court abused its discretion in certifying the class as proposed by the plaintiffs and in approving a settlement between the plaintiffs and the state defendants of plaintiffs' First Amendment claims. The decisions below are straightforward applications of Fed. R. Civ. P. 23(a), (b)(2) and (e). They simply do not present the grand issues that the Petitioner evidently would like this Court to decide.

The Petitioner's statement that "The essence of this litigation is an attempt by an advocacy group to use the federal courts to close the Arlington Developmental Center" is a mischaracterization unsupported by any evidence of record. Further, the remedy agreed to by the State of Tennessee defendants in United States of America v. State of Tennessee, and entered as a final order in this case on plaintiffs' motion, does not provide for closure of Arlington; indeed, it requires a massive expenditure of resources by the State of Tennessee to improve services at Arlington. Whatever the merits of

Petitioner's concern for the continued existence of state institutions, this case simply does not present the issue of the appropriateness of institutional closure as a remedy for violations of institutional residents' rights.

Both the United States and the Respondents have vigorously enforced the institutional improvement provisions of the Remedial Order. The Petitioner's apparent premise, that the remedy of community placement for some residents of Arlington is "mutually exclusive" of other remedies, presumably including the remedy of institutional improvement, starkly contradicts the record in this case. In the Remedial Order, the State of Tennessee agreed *both* to improve conditions at the institution *and* to provide appropriate services in the community for some Arlington residents. As the Petitioner acknowledges, that Order is being implemented and vigorously enforced in the District Court.

I. THE COURT CORRECTLY DETERMINED THAT RESPONDENTS WILL ADEQUATELY REPRESENT THE CLASS AND THAT THE OBJECTIONS OF SOME CLASS MEMBERS' PARENTS AND GUARDIANS TO THE CLASS REPRESENTATIVE STATUS OF PEOPLE FIRST OF TENNESSEE DID NOT CONSTITUTE A "CONFLICT" WITHIN THE CLASS.

Petitioner's claim that "The core issue [in this case] is whether institutions may continue to serve the disabled community as one care option" is far-fetched. No such sweeping issue has been tried or decided in this case. No court below has ordered a state institution closed. No court has ordered any resident placed in the community except as an expression of the judgment of the resident's own interdisciplinary team. Indeed, the final order in this case requires improvement in virtually every aspect of care and services at Arlington, including staffing, abuse and neglect investigation, psychology and habilitation, psychiatry, medical care, physical and nutritional management, nursing, physical and occupational therapy services, special education, record keeping, protection of residents' property and admissions and

discharge. Remedial Order, Pet. 166a-222a. If the Petitioner truly wished to "strengthen services" at the Arlington Developmental Center, it surely would have welcomed the relief ordered in this case.

The only issues before the District Court in deciding the plaintiffs' motion for class certification were whether the proposed class met the requirements of Rule 23(a) and (b)(2). No class definition or class representatives other than those proposed by the plaintiffs were presented to the court. If, in its statement that the District Court and Court of Appeals erred "by selecting one to represent all," Pet. at 5, the Petitioner means to suggest that the courts below chose one class representative over another, that suggestion misrepresents the record.

The underlying premise of the argument Petitioner advances here seems to be a *per se* rule that the claims of institutional residents can only be raised by a class representative who insists on continued institutionalization of

persons with severe disabilities. No court has ever adopted such an idiosyncratic rule.

The Petitioner assumes what it seeks to prove, that institutional residents cannot adequately be represented by class representatives who do not adhere to the particular ideological image of institutionalization embraced by the Petitioner.[6] The Petitioner never explains the nature of the "conflict of interest" it alleges between the class representatives and other members of the class, or how absent class members have been prejudiced by any action of present class representatives. Perhaps the Petitioner assumes that class representatives who advocate for community services will ignore the need for improved services at the institution and focus their advocacy solely on placing institutional residents in the community. If so, that assumption

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[6]That image seems to reflect a romantic notion that institutions, by their very nature, offer "constant protection and care," regardless of the actual staffing, availability of services and quality of care at a particular institution. As the Court found in its opinion delivered from the bench on November 22, 1993, "understandably, [parents' and family members'] view of the institution may be strongly affected by whether they have a continuing interest in the institution as a care provider or whether they no longer have that interest." Pet. at 96a.

is thoroughly belied by the record in this case, which shows that the named plaintiffs sought, and won, the entry of a detailed order that focuses primarily upon improvement of services at Arlington.[7]

The Petitioner's claim that it "speaks for people who are so disabled that their least restrictive alternative is institutionalization" and by implication, that the named plaintiffs cannot advocate for those persons, is nowhere supported in the record.[8] The District Court has never found that any group of Arlington residents have disabilitiesies that require continued institutionalization, and even the Petitioner has never identified which Arlington residents it thinks require institutionalization or showed how the relief sought and won by Respondents harms those persons' interests. Plainly, if Arlington residents

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[7]Forty-three pages of the Remedial Order are devoted to the requirements defendants must meet for services at Arlington, and only five pages to admissions, discharge and the standards governing community services.

[8]The District Court noted that the PGA did not object to the participation of named plaintiffs Carl Beard, Keith Collins and Stevelyn Tucker in this action and that they conceded that those three named plaintiffs were proper class representatives. Pet. 61a.

exist who require continued institutionalization, the Remedial Order, which requires that all Arlington residents receive the services recommended by their professional interdisciplinary teams (Remedial Order. III, Pet. at 173a) and permits community placement only when the resident's needs can be met in the community (Remedial Order XIV.B, Pet. at 209a), contemplates that those persons will remain at Arlington and received improved services there.[9]

The Court of Appeals for the Sixth Circuit was unquestionably correct when it found no abuse of discretion in the conclusions of the District Court that the requirements of Rule 23(a) and (b)(2) were satisfied. The class of at least 385 members met the numerosity, commonality and typicality

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[9]Nor did the Petitioner show that Arlington in fact offers "centralized, constant protection and care," Pet. at 16. As the District Court's findings make plain, Arlington offered, not protection and care but abuse, harm, and neglect of class members' most basic needs. Essential services such as physical therapy and behavior management were absent. Arlington was an unsafe environment where residents were subjected daily to injury, violence and unnecessary death. The court found that Arlington was "a system that follows a policy of convenience for employees, of casting the blame on a resident where there might be some fault of an employee, a failure to investigate because there is a policy of virtually no discipline of employees at Arlington Developmental Center." Pet. at 123a.

requirements of Rule 23(a) because Arlington residents' claims against the state "arose from the same patterns and practices ... and were based on the same legal theory." Pet. at 12a, citing In re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996). The Court of Appeals considered the objections to class certification by the Parent-Guardian Association, and upheld the District Court's rejection of the PGA's argument that the opposition of residents' parents and guardians to the class representatives should prevent the named plaintiffs from adequately representing the class. Pet. at 13a.

The District Court analyzed Tennessee law and the orders conferring limited guardianships and conservatorships on the approximately 235 residents for whom such orders existed, and found that "the parents and guardians lack the authority to waive the fundamental rights of their children and wards" or to prevent other representatives from bringing litigation on their wards' behalf. Pet. at 62a. Far from ignoring the interest of residents' parents and guardians in opposing the possibility of community placement for their sons, daughters and wards, the

court assured that the PGA would continue to advocate its position within the litigation by according it intervenor status.

Petitioner's reliance on this Court's decision in Amchem Products, Inc. V. Windsor, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 689 (1997) is misplaced. Amchem was a massive damages action in which the class was certified under Rule 23(b)(3), rather than 23(b)(2) as in the present case. In Amchem, plaintiffs' and defendants' counsel agreed upon a settlement that would establish a nationwide administrative system for processing claims for compensation by all present and future victims of asbestos exposure who had yet to file an action for damages. This Court held that the Court of Appeals for the Third Circuit properly instructed the District Court to decertify the class. The Court held that the requirement of Rule 23(b)(3) that "[common] questions of law or fact ... predominate over any questions affecting only individual members" was not met because class members' different injuries and degree and kind of exposure gave rise to significant differences in class members' legal claims under state tort laws.

117 S. Ct. at 2243, 2250.[10] Here, in contrast; all members of the certified class had common claims under the Due Process Clause and the First Amendment, and differences in class members' individual circumstances did not give rise to different legal claims.

The Court further held in Amchem that a fatal conflict existed between the interest of class members with current injuries in generous immediate payments, and the interest of exposure-only class members in ensuring an ample, inflation-protected fund for the future. 117 S. Ct. at 2251. Under the terms of the settlement agreement negotiated by the representatives of the proposed class, claims by both presently injured and exposure-only class members would be paid according to the same schedule, with no protection for inflation; thus, exposure-only class members would, in practice receive

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[10]In a 23(b)(2) class action, the plaintiffs do not need to show that common questions predominate over individual questions; they need show only that members of the proposed class "share at least one question of fact or law with the grievances of the prospective class," Baby Neal v. Casey, 43 F.3d 48, 56 (emphasis added). See Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L. Ed. 2d 176 (1979.

significantly less relief for the same injury than presently-injured class members. The settlement provisions also limited payment and numbers of certain kinds of claims that could be paid in a given year. 117 S.Ct. at 2240.

No such conflict exists here. Even assuming that some Arlington residents desire community placement and some desire continued residence at Arlington, the Remedial Order satisfies both interests. It is an injunction that requires *both* far-reaching improvements at Arlington *and* the provision of adequate services to class members placed in the community.

II. THE SETTLEMENT WITH THE STATE DEFENDANTS OF RESPONDENTS' FIRST AMENDMENT CLAIMS WAS FAIR AND REASONABLE.

The Court of Appeals found that in approving the settlement of plaintiffs' First Amendment claims, the District Court carefully considered the factors relevant to determine whether a proposed settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." The Court of Appeals found no abuse of discretion in the District Court's approval of the settlement, Pet. at 13a, and Petitioner has identified no abuse of discretion here.

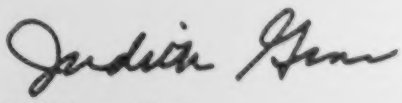
It appears, in fact, that the Petitioner's principal objection to the settlement was that the First Amendment claims were raised by the named plaintiffs, whom they describe as an "outside interest group," Pet. at 23, and that the plaintiffs had identified violations of residents' associational rights that PGA members had not experienced in their own association with their family members at Arlington. Since the state defendants actually stipulated in the settlement agreement that they had violated

residents' First Amendment violations in the past, it is difficult to understand how the District Court could reasonably have rejected the settlement on the strength of PGA members' lack of concern about those violations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,



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